

Before the
Federal Communications Commission
 Washington, DC

[JUN 15 1994]

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20541

In re Applications of)	MM Docket No. 93-107
)	
DAVID A. RINGER)	File No. BPH-911230MA
)	
ASF BROADCASTING CORP.)	File No. BPH-911230MB
)	
WILBURN INDUSTRIES, INC.)	File No. BPH-911230MC
)	
SHELLEE F. DAVIS)	File No. BPH-911231MA
)	
OHIO RADIO ASSOCIATES)	File No. BPH-911231MC

For Construction Permit for an
 FM Station on Channel 280A in
 Westerville, OH

To: The Review Board

OPPOSITION TO MOTION TO DISMISS

Shellee F. Davis ("Davis"), by her attorney, hereby submits her opposition to the "Motion to Dismiss the Application of Shellee F. Davis," filed by Ohio Radio Associates ("ORA") on June 6, 1994. With respect thereto, the following is stated:

1. Although ORA asserts that Davis' application must be dismissed for failure to specify a new transmitter site in this proceeding, ORA's Motion is unsupported by Commission precedent, and therefore should be denied. As recited in a past filing with the Commission, Davis just recently learned that she lost all right to specify her previous transmitter site, on April 27, 1994. "Withdrawal of Motion" dated May 3, 1994. Since that filing, in early-May 1994, Ms. Davis visited, confirmed the availability of, and reached an agreement in principle with the owner of a new site. Since that time, until last week, Ms. Davis was awaiting formalization of that tentative approval which could

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only take place after the landowner consulted with her attorney. That formal approval was received just last week. Now that it appears that a "meeting of the minds" with respect to the availability of the site has been achieved, drafting of the engineering portion of the amendment has already commenced, and completion of the engineering portion of the amendment is expected shortly. At the present time, it is expected that the amendment will be filed with the Commission within three weeks.

2. For these reasons, Davis clearly remains able to establish that she has acted with "due diligence." Within ten days of finally losing her previous site she began engaging in serious discussions concerning a new site. Although approximately one month then transpired before the approval was finally obtained, this delay occurred because of the need for the landowner to confer with her legal counsel. That brief delay was wholly beyond the control of Ms. Davis, and does not undercut her diligent behavior. And now that "reasonable assurance" has been obtained, Davis immediately (within two weeks) made final arrangements for the preparation of the engineering portion of the application through a qualified Consulting Engineer, and almost immediately upon its completion (i.e., following her review of that engineering statement), Ms. Davis expects to be in a position to file that amendment with the Commission.

3. The Commission has stated that six months is the "outer limit" of due diligence¹ -- here, it has been only six weeks since Shellee Davis learned that she unexpectedly and unforeseeably had lost the previously-designated transmitter site. More

¹ California Broadcasting Corp., 90 F.C.C.2d 800, 808 ¶ 19 (1982), cited in, Imagists, 8 FCC Rcd 2763, 2765 n. 17 (1993).

importantly, Ms. Davis has at all been continuing to act in a diligent manner to securing the proper clearances and materials that are required prior to submitting an amendment to the Commission. In Elijah Broadcasting Corp., 65 R.R.2d 461 (Rev. Bd. 1988), aff'd, 68 R.R.2d 205 (1990), "due diligence" was found to exist where, as here, an applicant timely informed the Commission of the loss of its transmitter site, immediately began a search for a suitable alternative site, and specified a new site within six months of the loss. Id. at 465, ¶ 15. In Mabelton Broadcasting Co., Inc., 5 FCC Rcd 6314, 6320-21 ¶ 28 (Rev. Bd. 1990), the Review Board reversed an ALJ finding of lack of "due diligence" for engineering amendment where applicant took approximately three months to amend to new site. Consistent with these past rulings, and especially in light of Ms. Davis' actions and continued progress, Davis' application remains capable of being amended and Ms. Davis remains capable of demonstrating "due diligence" in her efforts to amend. Thus, ORA's Motion must be denied.

4. As Wilburn Industries, Inc. ("WII") has ably pointed out in a similar Opposition filed with the Review Board in this proceeding yesterday, the cases cited by ORA in support of its Motion are inapposite, and largely serve to highlight the frivolous nature of its submission. In National Communications Industries, 6 FCC Rcd 1978, 1979 ¶ 6 (Rev. Bd. 1991), an applicant failed to promptly advise the Commission that it had lost its site and did not submit a revised technical proposal until eight months after it had learned of its loss. Those facts are not close to being present here. Similarly, in Marlin Broadcasting of Central Florida, Inc., 5 FCC Rcd 5751, 5752 ¶ 10 (1990), an applicant waited sixteen months before advising the Commission of a change in its basic qualifications, which destroyed any ability of the applicant to demonstrate the existence

of "due diligence" -- facts also which are not at all present in this case. Finally, Brownfield Broadcasting Corp., 88 F.C.C.2d 1054 (1982), involved situations where "due diligence" was found not to exist where applicants had waited more than one year to amend their applications. Again, Davis is not even close to reaching that temporal barrier.

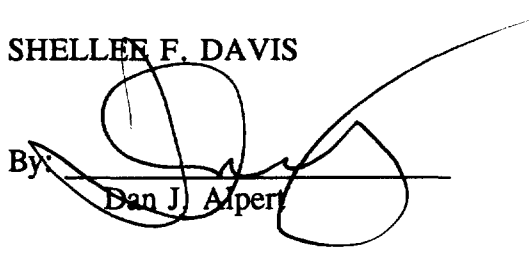
5. Those cases, and the facts underlying the Commission's ultimate rejection of amendments filed in those proceedings, are not present here. Consequently, ORA has not shown that under the Commission's amendment standards Davis' application will be forced to remain in a permanently defective state. Therefore, dismissal of her application is not in any way legally warranted.

WHEREFORE, it is respectfully requested that the "Motion to Dismiss the Application of Shellee F. Davis" be denied.

Respectfully requested,

SHELLEE F. DAVIS

By:


Dan J. Alper

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June 15, 1994

CERTIFICATE OF SERVICE

I, Dan J. Alpert, hereby certify that foregoing document was served on June 15, 1994 upon the following parties by First Class Mail, postage prepaid, or by Hand:

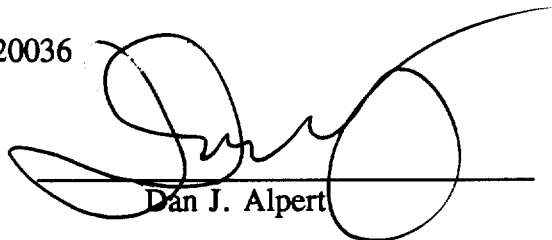
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